

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

ROBERT A. MEDVED,

Petitioner,

v.

CITY OF MERCER ISLAND,

Respondent.

19-3-0014

ORDER FINDING COMPLIANCE

I. INTRODUCTION

On August 15, 2019, the Board issued an Order Finding Noncompliance Pursuant to Stipulation. The parties agreed that the City of Mercer Island had failed to act to adopt a development regulation docketing procedure as required by RCW 36.70A.470. The City submitted its statement of actions taken by comply, along with a compliance index.¹ Thereafter, the Petitioner submitted his objection,² to which the City replied.³ A telephonic compliance hearing was held April 6 in which Petitioner Medved represented himself; Bio Park represented the City of Mercer Island. All three board members in this case attended the hearing.

II. STANDARD OF REVIEW

After the Board has entered a finding of noncompliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.⁴ After the period for compliance

¹ City of Mercer Island's Statement of Actions Taken to Comply (March 3, 2020).

² Petitioner's Objections to the City's Statement of Actions Taken to Comply and Petitioner's Objections to the City's Compliance Index (Petitioner's Objection, March 17, 2020).

³ City of Mercer Island's Response to Petitioner's Objections, March 27, 2020.

⁴ RCW 36.70A.300(3)(b).

1 has expired, the Board is required to hold a hearing to determine whether the local
2 jurisdiction has achieved compliance.⁵ For purposes of Board review of the comprehensive
3 plans and development regulations adopted by local governments in response to a
4 noncompliance finding, the presumption of validity applies and the burden is on the
5 challenger to establish that the new adoption is clearly erroneous in view of the entire record
6 before the board and in light of the goals and requirements of the GMA.⁶
7

8 In order to find the City's action clearly erroneous, the Board must be "left with the
9 firm and definite conviction that a mistake has been made."⁷ Within the framework of state
10 goals and requirements, the Board must grant deference to local governments in how they
11 plan for growth.⁸ Thus, during compliance proceedings the burden remains on the Petitioner
12 to overcome the presumption of validity and demonstrate that **any action** taken by the City
13 is clearly erroneous in light of the goals and requirements of chapter 36.70A RCW (the
14 Growth Management Act).⁹
15

16 III. DISCUSSION

17 Action Taken to Comply

18 The City adopted Ordinance No. 19C-21 on December 10, 2019, amending Title 19
19 of the Mercer Island City Code, creating procedures to docket and consider suggested
20 development regulation amendments from interested persons. It amended sections of the
21 Mercer Island City Code, MICC 19.15.230 (requiring the City to maintain a list of suggested
22 changes to the code) and MICC 19.15.250 (permitting interested persons to suggest code
23 amendments for docketing in the aforementioned list), requiring the City to consider
24 suggested changes on at least an annual basis.
25
26
27
28
29

30 ⁵ RCW 36.70A.330(1) and (2).

31 ⁶ RCW 36.70A.320(1), (2), and (3).

32 ⁷ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

⁸ RCW 36.70A.3201.

⁹ RCW 36.70A.320(2).

1 **Petitioner's Objection and City Response**

2 Petitioner's objection is based on his assertion that the actions taken in compliance
3 are "inaccurate and incomplete."¹⁰ The statement of compliance, in Petitioner's view
4 "implies that the City is not required to docket City-initiated code amendments and that the
5 City may adopt code amendments at any time," describing the interaction of two MICC code
6 subsections, MICC 19.15.250(C)(1) and (C)(2). Petitioner's argument is that the action
7 taken, and/or the way it may be construed in relation to other city code provisions, may
8 violate certain common-law principles of statutory construction.¹¹ Further, Petitioner alleged
9 that the compliance index submitted did not include two important documents: a letter from
10 the Petitioner to the City Council and a PowerPoint presentation made by the Director of
11 Community Planning and Development.¹² The City filed a response and submitted the
12 requested additional documents as supplemental exhibits. ¹³
13
14

15 **Board Analysis**

16 The Board's Order in this case required the City to comply with RCW 36.70A.470,
17 which provides:
18

19 RCW 36.70A.470, enacted in 1995, provides in part as follows:

20 (2) Each county and city planning under RCW 36.70A.040 shall include in its
21 development regulations a procedure for any interested person, including
22 applicants, citizens, hearing examiners, and staff of other agencies, to suggest
23 plan or development regulation amendments. The suggested amendments
24 shall be docketed and considered on at least an annual basis, consistent with
25 the provisions of RCW 36.70A.130.

26 ...

27 (4) For purposes of this section, docketing refers to compiling and maintaining
28 a list of suggested changes to the comprehensive plan or development
29

30 ¹⁰ Petitioner's Objection p. 2.

31 ¹¹ Petitioner cites *Faben Point v. Mercer Island*, 102 Wn. App 775 (2000); *Porter v. Kirkendoll*, 449 P.3d 627
32 (2019); *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516 (2010); *Western Telepage v. City of Tacoma*,
95 Wn. App 140 (1999), for various general propositions in statutory construction and municipal law.

¹² Petitioner's Objection p. 6.

¹³ City of Mercer Island's Response to Petitioner's Objections (March 27, 2020).

1 regulations in a manner that will ensure such suggested changes will be
2 considered by the county or city and will be available for review by the public.

3 The Petitioner does not dispute that the City took action to provide for docketing of
4 proposed amendments to development regulations; his objection goes to his belief that the
5 action was noncompliant because it does not provide that City initiated development
6 regulations must also be docketed. The Board's rules provide guidance here:
7

8 When the basis for an order of noncompliance is the failure to take an action
9 ..., the only question before the board at the compliance hearing is whether
10 the [jurisdiction] has taken the required action. Any challenge to the merits of
11 the newly enacted legislation must be asserted in a new petition for review.
WAC 242-03-940(4)

12 Thus the question before the Board on compliance is whether the City's action has
13 brought the City into compliance with RCW 36.70A.470. Here, the City enacted procedures
14 for interested persons to suggest amendments to the comprehensive plan and/or
15 development regulations such that they are docketed and considered at least annually.
16 Petitioner objects to the merits of the legislation, as it may be interpreted together with other
17 sections of the city code, concerning suggested changes instigated or considered by the
18 City Council. The Board notes that RCW 36.70A.470 does not require docketing of council-
19 initiated amendments.
20

21 **The Board finds** that the text of Ordinance 19C-21 amends MICC 19.15.230 and
22 MICC 19.15.250 to include docketing procedures for development regulations.
23

24 **The Board finds** that the amendment to MICC 19.15.230 requires the City to
25 maintain a list of suggested changes to the code (development regulations) in addition to
26 the docketing of comprehensive plan amendments.

27 **The Board finds** that the amendment to MICC 19.15.250 permitted interested
28 persons to suggest code amendments for docketing in the aforementioned list, requiring the
29 City to consider them on at least an annual basis.
30

31 **The Board finds** that by passage of Ordinance 19C-21, the City has adopted a
32 docketing procedure for suggested changes to the City's development regulations in
compliance with RCW 36.70A.470.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

IV. ORDER

Based upon review of the Board's Order Finding Noncompliance, the City of Mercer Island's Statement of Actions Taken to Achieve Compliance, Ordinance 19C-21, the Growth Management Act, prior Board orders and case law, and having considered the arguments of the parties offered in the briefing and at the compliance hearing, and having deliberated on the matter, **the Board finds and concludes** that the City is in compliance with RCW 36.70A.470 and this case is closed.

SO ORDERED this 1st day of May 2020.

Deb Eddy, Board Member

Cheryl Pflug, Board Member

Bill Hinkle, Board Member